Supreme Court, U.S.
FILED
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NO. (1)

In The Supreme Court of the United States

JONATHAN K. SMITH,
a member of the Shinnecock Indian Nation, a/k/a
SHINNECOCK SMOKE SHOP, residing and with his
place of business on the Shinnecock
Indian Nation Reservation,

Petitioner,

v.

ANDREW M. CUOMO,
in his official capacity as
Attorney General of the State of New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: June 15, 2009

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the heightened "plausibility" pleading standard under Fed. R. Civ. P. 12(b)(6) enunciated in the anti-trust case, *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955 (2007), is limited to anti-trust pleading?

II. Whether the District Courts should draw references favorable to the party asserting jurisdiction under Fed. R. Civ. P. 12(b)(1)?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner

Petitioner is Jonathan K. Smith, an on-reservation member of the Shinnecock Indian Nation, doing business as Shinnecock Smoke Shop. Petitioner was the Plaintiff in the District Court and Appellant in the United States Court of Appeals for the Second Circuit. Petitioner is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Respondent

Respondent is Andrew Cuomo in his official capacity as Attorney General of the State of New York. Respondent was the Defendant in the District Court and was substituted for Eliot Spitzer, the original named Defendant, upon replacing Eliot Spitzer as Attorney General. Respondent is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the judgment in this case by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit Court of Appeals Decision was issued on January 12, 2009. An Order denying rehearing *en banc* was issued on March 17, 2009. The District Court's Order dismissing Petitioner's Complaint was issued on September 30, 2007.

STATEMENT OF JURISDICTION

The Second Circuit Court of Appeals entered its judgment on January 12, 2009, and denied a timely filed petition for rehearing *en banc* on March 17, 2009. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. 1254(1).

TREATY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following treaty, constitutional, and statutory provisions, which are reproduced in the Appendix at App. E at 62 *et. seq.*:

A. *The Fort Albany Treaty*, 1664
B. Contract Clause
C. Indian Commerce Clause, Interstate Commerce Clause

STATEMENT OF THE CASE AND FACTS

Petitioner is an on-reservation member of the Shinnecock Indian Nation, doing business as Shinnecock Smoke Shop. The original Defendant was Eliot Spitzer, sued in his official capacity as New York Attorney General.

The Shinnecock Indian Nation is an aboriginal self-governing people, which has continuously dwelled on what is now known on Long Island, New York, since at least 1000 B.C. Today, after a series of purported land transfers to the founders of the Town of Southampton, New York, beginning in 1640 and ending with a legislative act of the New York State Legislature in 1859, the Shinnecock Indian Nation occupies what is now known as the Shinnecock Indian Reservation, located within the territorial boundaries of the Town of Southampton.

During Eliot Spitzer's campaign for governor while he was the sitting Attorney General of New York, he publicly declared to media that on-reservation Native Americans were "criminals". This coincided with actions taken to harm on-reservation Indian businesses by threatening off-reservation non-Indian parties in the chain of commerce, such as by sending letters to out-state credit card processing companies and an out-state tobacco manufacturer, and in-state delivery carriers, alleging, among other things, that Petitioner and other indigenous people were violating New York law and threatened legal action against the non-

Indian parties for aiding and abetting such allegedly unlawful activity.

Spitzer's actions caused various vendors to terminate business with Petitioner, and Petitioner sought relief from the courts, first in state court, which resulted in dismissal, then in federal court, which also resulted in dismissal, to vindicate his treaty rights and to attempt to restore his business relationships.

Petitioner's Second Amended Complaint in the District Court plead:

A. Violation of the treaty guarantee of free trade under the terms of Article 4 and Appended Article 3 of *The Fort Albany Treaty*, 1664, ("Articles between Col. Cartwright and the New York Indians", *Documents Relative to the Colonial History of the State of New York*, III, pp. 67-68);

B. Violation of the Contract Clause of the federal constitution, U.S. CONST. Art. I, § 10 Cl. 1;

C. Without and in excess of jurisdiction, as federal jurisdiction is exclusive and New York State jurisdiction is preempted, pursuant to the Indian Commerce Clause of the federal constitution, U.S. CONST. Art. I, § 8, Cl. 3, and 18 U.S.C. §§ 1151 *et seq*,

specifically 18 U.S.C. § 1162, and 28 U.S.C. § 1360;

D. Violation of the policy of the Congress of the United States concerning Indians;

E. Violation of and unduly interferes in the trustee relationship of the government of the United States of America as trustee and guardian of Petitioner.

F. Violation of the Interstate Commerce Clause, U.S. CONST. Art. I, § 8, Cl. 3

In federal court, the District Court dismissed Petitioner's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In dismissing under Rule 12(b)(6), the District Court applied the heightened "plausibility" pleading standard enunciated by this Court in the anti-trust case, *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955 (2007). The District Court expressly stated that on a Rule 12(b)(1) motion, "the Court will not draw references [sic] favorable to the party asserting jurisdiction." [citing *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998)].

The District Court erroneously applied these standards and dismissed Petitioner's Second Amended Complaint on the basis of a finding of lack

of Article III standing, and a finding that the Tax Injunction Act, 28 U.S.C. § 1341, applied.

The Second Circuit Court of Appeals affirmed, and denied rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This case shows a growing division within the Circuits in application of this Court's important enunciation of the heightened "plausibility" pleading standard in the anti-trust case *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955 (2007), with the division occurring on the specific question whether the heightened standard applies outside the context of anti-trust pleading. The Second Circuit holds it does. Additionally an important federal jurisdiction pleading burden is presented.

I. The Second Circuit stands out in application of the heightened "plausibility" pleading standard outside the anti-trust context.

Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), along with *Bell Atl. Corp.* was cited and relied upon by the District Court below in dismissing Petitioner's action under Rule 12(b)(6), This was upheld by the Second Circuit.

The Second Circuit in *Iqbal* stated considerable uncertainty as to whether *Bell Atl. Corp.* is limited to antitrust pleading. *Iqbal*, 490 F.3d 155-159. *Iqbal* rejected the contention that this

Court is requiring a universal heightened pleading standard, but rather is "requiring a flexible 'plausibility standard'" which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible.*" [emphasis in original] *Iqbal*, 490 F.3d 157-158. *Iqbal*, decided this "plausibility" standard applied to that case at hand, which involved the defense of qualified immunity of government officials. *Iqbal*, 490 F.3d 158.

II. Courts in other Circuits limit the heightened pleading standard to the anti-trust context.

In cases since *Bell Atl. Corp.* was decided, courts have been applying *Bell Atl. Corp.* only to antitrust cases. *Hyland v. Homeservices of America, Inc.*, 2007 WL 2407232, 3 (W.D. Ky.); *Behrend v. Comcast Corporation*, 2007 WL 2221415, 1 (E.D. Pa.); *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 631 FN3 (Minn. 2007); *In Re Hypodermic Products Antitrust Litigation*, 2007 WL 1959225, 6 (D.N.J.); *In Re Netflix Antitrust Litigation*, 506 F. Supp. 2d 308 (N.D. Cal.)

III. This Court intended the heightened pleading standard to be limited to the anti-trust context.

On the 21st of May, 2007, this Court decided *Bell Atl. Corp.* In *Bell Atl. Corp.*, this Court expressly "granted certiorari to address the proper standard for pleading an antitrust conspiracy

through allegations of parallel conduct" *Bell Atl. Corp.*, 127 S. Ct., 1963.

This Court focused on the "antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act." *Bell Atl. Corp.*, 127 S. Ct., 1964. This Court answered, that, "In applying these standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl. Corp.*, 127 S. Ct., 1965. In moving from a "no set of facts" in *Conley v. Gibson*, 355 U.S. 41 (1957), to a newly stated "plausibility" pleading standard, the rationale of this Court made much of the expense involved in antitrust litigation. *Bell Atl. Corp.*, 127 S. Ct., 1966-1967. There is no language in *Bell Atl. Corp.* indicating whether the new standard would be, or could be, applied out of the antitrust context.

IV. This Court requires pleadings to be viewed favorably to the party invoking federal jurisdiction.

The District Court, in dismissing Petitioner's action under 12(b)(1), expressly stated that on a Rule 12(b)(1) motion, "the Court will not draw references [sic] favorable to the party asserting jurisdiction." [citing *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir 1998)]. This was upheld by the Second Circuit.

However, "[I]t is well established that, in passing on a motion to dismiss on the ground of lack of jurisdiction over the subject matter or for failure

to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

CONCLUSION

Unlike courts in other Circuits, the Second Circuit has expanded this Court's newly enunciated heightened "plausibility" pleading standard to cases outside the anti-trust context, and construes federal jurisdiction pleading not in favor of the pleader. The result is a higher pleading threshold, making it harder for Plaintiffs to oppose Rule 12(b)(1) and (6) motions to dismiss on common issues such as Standing.

Respectfully submitted,

/s/

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07-4791-cv
Smith v. Cuomo

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE

AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of Janaury, two thousand nine.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. GUIDO CALABRESI,
HON. ROBERT D. SACK,
Circuit Judges.

- X

JONATHAN K. SMITH, a member of the Shinnecock Indian Nation, a/k/a Shinnecock Smoke Shop, residing and with his place of business on the Shinnecock Indian Nation Reservation,

Plaintiff-Appellant,

-v.- **07-4791-cv**

ANDREW CUOMO, in his official capacity as Attorney General of the State of New York,

Defendant-Appellee.

- X

APPEARING FOR APPELLANT:
SCOTT MICHAEL MOORE, Moore International Law Offices, New York, NY.

APPEARING FOR APPELLEES:
RICHARD DEARING, Assistant Solicitor General, (Barbara D. Underwood, Solicitor General, and Benjamin N. Gutman, Deputy Solicitor General on the brief), for Andrew M. Cuomo, Attorney General of the State of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Seybert, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Jonathan K. Smith appeals from a judgment of the United States District Court for the Eastern District of New York (Seybert, J.), dismissing his complaint on numerous grounds. The court held, *inter alia*, that Smith's claims I-III were barred by res judicata, and that his claims IV-V were barred by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341. We assume the parties' familiarity with the underlying facts and the procedural history.

Smith's initial brief to this Court challenges only the legal standards applied by the district court in assessing the defendant's motion to dismiss. Smith argues that the district court erred in evaluating the defendant's motion under Fed. R. Civ.

P. 12(b)(1) by declining to draw all inferences in his favor, and that the district court erred in evaluating the defendant's motion under Fed. R. Civ. P. 12(b)(6) by invoking the "flexible plausibility standard" set forth in Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007) (internal quotation marks omitted), *cert. granted sub nom.*, Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008).

Smith's initial brief fails to argue how his complaint would have avoided dismissal under the standards he advocates. Moreover, Smith's initial brief does not challenge certain rulings by the district court that are dispositive of this appeal and are unaffected by any of the challenged standards. Specifically, Smith does not challenge the district court's holding that his claims I-III were barred by res judicata, and (although he mentions the TIA in passing) he does not explain how different standards would have altered the court's analysis of the TIA.

Accordingly, Smith has waived any challenge to the district court's application of res judicata and the TIA. See Fed. R. App. P. 28(a)(9); LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995) (holding that an issue is abandoned where not raised in appellate brief); United States v. Joyner, 313 F.3d 40, 44 (2d Cir. 2002) ("It is well established that an argument not raised on appeal is deemed abandoned and lost, and that a court of appeals will not consider the argument unless it has reason to believe that manifest injustice would result otherwise." (internal quotations omitted)).

We decline to consider arguments that Smith raises for the first time in the reply brief or at oral argument. See NLRB v. Star Color Plate Serv., 843 F.2d 1507, 1510 n.3 (2d Cir. 1988)(appellate court may reject any argument raised for the first time in a reply brief).

Accordingly, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By: /s/

[FILED: MARCH 17, 2009]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of March, two thousand and nine,

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Jonathan K. Smith, a member of the Shinnecock Indian Nation, a/k/a Shinnecock Smoke Shop, residing and with his place of business on the Shinnecock Indian Nation Reservation,

Plaintiff-Appellant,

v. **ORDER**
Docket No. 07-4791-cv

Andrew Cuomo, in his official capacity as Attorney General of the State of New York,

Defendant-Appellee.

Appellant Jonathan Smith having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
JONATHAN K. SMITH, a member of the Shinnecock Indian Nation, a/k/a SHINNECOCK SMOKE SHOP, residing and with his place of business on the Shinnecock Indian Nation Reservation,

Plaintiff,

MEMORANDUM AND ORDER
06-CV-3181 (JS)(WDW)

- against -

ANDREW M. CUOMO, in his official capacity as Attorney General of the State of New York,

Defendant.
----------X

Appearances:
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SEYBERT, District Judge,

INTRODUCTION

On June 28, 2006, Plaintiff Jonathan K. Smith, a member of the Shinnecock Indian Nation, ("Plaintiff") commenced this action against Eliot Spitzer,[1] in his official capacity as Attorney General of the State of New York ("Defendant"). Presently pending before the Court are numerous motions, including (1) Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim, (2) Plaintiff's motion for a preliminary injunction, (3) Plaintiff's motion for leave to file a Third Amended Complaint, (4) Plaintiff's motion to consolidate the underlying action with Smith v. Everson, No. 06-CV-791, and (5) Plaintiff's request for a pre-motion conference.[2] For the reasons set forth herein, Defendant's motion to dismiss is GRANTED, and Plaintiff's motion for

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[1] Plaintiff initially commenced this action against Eliot Spitzer, in his official capacity as Attorney General of the State of New York. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, when Andrew M. Cuomo replaced Mr. Spitzer as Attorney General, Mr. Cuomo, in his official capacity, automatically substituted Mr. Spitzer as Defendant in this action. The Court directs that the caption be updated accordingly.

[2] After the motions were fully briefed, both parties filed numerous letters with the Court citing supplemental authority. The Court reviewed and considered all authority cited by the parties. To the extent that such authority is not binding on the Court or is irrelevant to the claims asserted (e.g., a report from the Attorney General's Office on the alleged misuse of state aircraft, dated July 23, 2007), the Court does not discuss such authority.

leave to file a Third Amended Complaint is DENIED. Accordingly, Plaintiff's motions for a preliminary injunction, to consolidate, and for a pre-motion conference are rendered moot.

BACKGROUND

Familiarity with the facts of this case are presumed. In the event the parties require a detailed refresher, they are directed to review the Order, dated January 16, 2007 ("January Order"), dismissing the Amended Complaint, granting Plaintiff leave to file a Second Amended Complaint, and denying Plaintiff's motion for a preliminary injunction.[3] The gravaman of Plaintiff's claims is that any attempt to enforce or threat to enforce certain New York State statutes violates Plaintiff's rights under various sections of the Constitution, federal laws, treaties, and general policies of the United States concerning Indians.

I. Plaintiff's Article 78 Proceeding

On or about April 25, 2005, Plaintiff commenced an Article 78 proceeding in Supreme Court, Albany County, under index number 2494-05. Plaintiff commenced the Article 78 proceeding after he was contacted by Discover Network and Cardservice International concerning the February Letters. Through the Article 78 proceeding, Plaintiff sought to stay the enforcement of PHL § 1399-ii and sought a declaratory judgment that PHL § 1399-ii was invalid as applied to Plaintiff. Plaintiff's

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[3] Capitalized terms used but not defined herein are defined in the January Order.

asserted right to this relief was based on the Fort Albany Treaty.

On June 22, 2005, Supreme Court Justice Nicholas A. Clemente dismissed Plaintiff's Article 78 proceeding. See Smith v. Spitzer, No. 2494-05 (N.Y. Sup. Ct. Albany County June 22, 2005). The dismissal was affirmed by the Appellate Division, Third Department. See Smith v. Spitzer, 28 A.D.3d 1047, 814 N.Y.S.2d 338 (App. Div. 2006).

In sum, Justice Clemente held that (1) Plaintiff's purported injury was not attributable to any government function or activity; therefore an Article 78 proceeding did not lie, (2) Plaintiff lacked standing to sue under the Fort Albany Treaty of 1664, and (3) Plaintiff failed to join the Shinnecock tribe as a necessary party. The Appellate Division agreed with the lower court and added that Plaintiff's remaining arguments were either moot or, upon review, found to be without merit. (Id.)

II. The Current Action

Plaintiff filed the Complaint on June 28, 2006 alleging three claims arising from the Initial Letters. On July 20, 2006, Plaintiff filed the First Amended Complaint to add a fourth count, which arises from the Gutlove Letter, dated June 28, 2006, the date on which the Complaint was filed. The January Order dismissed all four counts based on lack of standing. Specifically, Counts I-III, which are based on the Initial Letters, were dismissed because Plaintiff failed to allege that the injury claimed would be redressed by a favorable decision, and Count IV,

which is based on the Gutlove Letter, was dismissed because Plaintiff failed to allege an actual or imminent injury.

Pursuant to the January Order, Plaintiff filed a Second Amended Complaint on January 24, 2007. The Second Amended Complaint is nearly identical, with respect to Counts I-IV, to the Amended Complaint and adds a fifth count. Once again, Plaintiff claims that by sending the Initial Letters (Counts I-III) and the Gutlove Letter (Count IV), Defendant violated (1) a treaty guarantee of free trade under the articles of The Fort Albany Treaty, 1664 (the "Fort Albany Treaty"), ("Articles between Col. Cartwright and the New York Indians," Documents Relative to the Colonial History of the State of New York, III, pp. 67-68); (2) the Contract Clause of the United States Constitution, art. I, s. 10 cl. 1; (3) the Indian Commerce Clause of the United States Constitution, art. I, s. 8, cl. 3, and 18 U.S.C. §§ 1151 et seq., specifically 18 U.S.C. § 1162 and 28 U.S.C. § 1360; (4) the policy of the Congress of the United States concerning Indians; and (5) the trustee relationship of the government of the United States as trustee and guardian of the Plaintiff as a result of his membership in the Shinnecock Indian Nation. The only additional allegation in the first four counts appears in paragraph 28. Namely, Plaintiff alleges that five weeks after Defendant sent the Gutlove Letter, Defendant's false allegations, pressure, and threats, caused Gutlove, under duress, to reduce shipment of PhillipMorrisUSA ("PhillipMorris") products to Plaintiff by 90% during the month of August 2006 and by an additional 35% from the first week in September 2006 to January

2007. (2d Am. Con pl. ¶ 28.) Count V, which also arises from the Gutlove Letter, is premised on the theory that Defendant violated, and continues to violate, the Interstate Commerce Clause. (Id. ¶ 33.)

The Second Amended Complaint also differs from the Amended Complaint in the relief it requests. Plaintiff continues to request declaratory and injunctive relief.[4] Specifically, Plaintiff seeks (1) a declaratory judgment that PHL § 1399-ii is "invalid, as applied to Plaintiff" and to transactions between Plaintiff and each of the Merchants, (2) a declaratory judgment that N.Y. Tax Law § 471-e is "invalid, as applied to Plaintiff" and to transactions between Plaintiff and Gutlove and PhillipMorris, (3) a declaratory judgment that N.Y. Tax Law § 471-e is not in effect, and (4) injunctive relief prohibiting the application of PHL § 1399-ii and N.Y. Tax Law § 471-e as to transactions between Plaintiff and each of the Merchants and Gutlove and PhillipMorris, respectively. (Id. ¶¶ 34-38.) In addition, Plaintiff requests that Defendant be required to (a) send written notice to each of the Merchants, Gutlove, and PhillipMorris withdrawing the prior letters (i.e., the Initial Letters and the Gutlove Letter) and (b) refrain from sending any future letters threatening enforcement of PHL § 1399-ii and N.Y. Tax Law § 471-e as to transactions between Plaintiff and each of the Merchants and Gutlove and PhillipMorris, respectively. (Id. ¶¶ 35, 37, 39.) Defendant moves to dismiss the Second Amended Complaint and opposes

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[4] The Second Amended Complaint, unlike the Amended Complaint, does not request relief related to N.Y. Tax Law § 1814 and N.Y. Penal Law § 20.00.

Plaintiff's motions for a preliminary injunction, leave to file a Third Amended Complaint, and consolidation.

DISCUSSION

I. Defendant's Motion To Dismiss

The Defendant moves to dismiss the Second Amended Complaint on two grounds. First, Defendant moves to dismiss for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). Second, Defendant moves to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). Usually the issue of jurisdiction must be resolved before this Court can address whether the Plaintiff has sufficiently stated his claims. See Rhulen Agency, Inc. v. Alabama Ins. Guaranty Ass'n, 896 F.2d 674, 678 (2d Cir. 1990) (A "motion to dismiss for failure to state a claim may be decided only after finding subject matter jurisdiction.") (citations omitted). In this case, however, Defendant's arguments under Rule 12(b)(6) concerning res judicata are substantially intertwined with Plaintiff's Article III standing and, therefore, the two arguments will be discussed simultaneously.

A. Standard Of Review On Motion To Dismiss

1. Rule 12(b)(1)

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1),

the Court may consider affidavits and other materials beyond the pleadings to resolve jurisdictional questions. See Robinson v. Gov't of Malaysia, 269 F.3d 133, 140 n.6 (2d Cir. 2001). Under Rule 12(b)(1), the Court will deem true the factual allegations contained in the complaint. See Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997). When, however, there is a question involving federal jurisdiction, such jurisdiction must be shown affirmatively. See Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998) (citing Norton v. Larney, 266 U.S. 511, 515, 45 S. Ct. 145, 69 L. Ed. 413 (1925)). Accordingly, the Court will not draw references favorable to the party asserting jurisdiction. See id.

2. Rule 12(b)(6)

In Bell Atl. Corp. v. Twombly, -- U.S. --, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Supreme Court disavowed the half-century old standard set forth in Conley v. Gibson that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), (overruled by Bell Atl. Corp., 127 S. Ct. 1955 (2007). Holding that "Conley's 'no set of facts' language has been questioned, criticized, and explained away long enough," the Supreme Court expressly rejected the standard in favor of a requirement that the plaintiff plead enough facts "to state a claim for relief that is plausible on its face." Bell Atl. Corp., 127 S. Ct. at 1969, 1974. The Court explained that the complaint

"must be enough to raise a right to relief above the speculative level." Id. at 1965. To be clear, Bell Atlantic does not require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." Id. at 1974.

The Second Circuit has interpreted Bell Atlantic to require "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007). Moreover, in applying this new standard, the district court must still accept the factual allegations set forth in the Complaint as true and draw all reasonable inferences in favor of Plaintiff. See Cleveland v. Caplaw Enter., 448 F.3d 518, 521 (2d Cir. 2006); Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005).

B. Lack Of Subject Matter Jurisdiction

Defendant asserts that this Court lacks subject matter jurisdiction over the instant action based on three independent reasons: (1) Plaintiff's lack of standing under Article III of the United States Constitution, (2) the principal of sovereign immunity embodied in the Eleventh Amendment, and (3) the Tax Injunction Act ("TIA"), 28 U.S.C. §

1341.[5] Additionally, although not a jurisdictional challenge, Defendant argues that res judicata precludes Plaintiff from bringing this action.

This Court previously dismissed Counts I-IV for lack of standing. (January Order at 13.) Specifically, the Court found that (a) Plaintiff failed to allege that the injury claimed as a result of the Initial Letters (Counts I-III) would likely be redressed by a favorable decision and (b) Plaintiff failed to allege that he suffered an actual or imminent injury as a result of the Gutlove Letter (Count IV). Plaintiff contends that he has addressed the deficiencies identified in the January Order by adding additional requests for relief (Compl. ¶¶ 34-39) and alleging actual injury as a result of the Gutlove Letter. (Id. ¶28.) Defendant disputes this contention and points to recent New York case law, which causes this Court to reconsider determinations made in the January Order.[6]

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[5] The Court finds Defendant's arguments regarding Eleventh Amendment sovereign immunity without merit based on the Ex parte Young exception. Because, however, the Court finds that it lacks subject matter jurisdiction based on Defendant's first and third arguments, it does not engage in a detailed analysis of the Eleventh Amendment and Ex parte Young.

[6] Revisiting a prior determination is entirely within the Court's discretion. See Aramony v. United Way of Am., 254 F.3d 403, 410 (2d Cir. 2001).

1. Article III Standing

To bring suit, Article III, Section 2 of the United States Constitution requires that a person have standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Article III limits the jurisdiction of federal courts to claims that are "cases" or "controversies," and standing is an essential element of the case-or-controversy requirement. U.S. CONST. art. III, § 2; see also Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions'." Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)).

In order to satisfy the standing requirement, a plaintiff must meet an "irreducible constitutional minimum", which requires

> (1) that the plaintiff have suffered an injury in fact – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the

> conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (citing Lujan, 504 U.S. at 560-561).

a. The Initial Letters – Counts I, II, And III

The Court previously determined that Plaintiff satisfied the first two prongs of the standing inquiry with respect to Counts I-III but dismissed the action for failure to allege or offer any support to show that the requested relief would restore Plaintiff's relationships with the Merchants or that it would be likely to have such effect. (January Order at 10.) Specifically with respect to the second standing requirement – causal connection – the Court explained that

> Although Justice Clemente, and presumably the Appellate Division, had the benefit of reviewing the February Letters, this Court cannot ignore the fact that within several months after the Initial Letters were sent, the Merchants terminated their respective relationships with Plaintiff. Such facts indicate a fairly traceable link between the Initial Letters and the injury claimed.

January Order at 10.

i. Causal Connection And Res Judicata

Based on new case law that has been brought to the Court's attention and prior case law that the Court apparently overlooked, it now reconsiders its determination regarding the causation requirement of standing. As noted above and in the January Order, the state court held that Plaintiff lacked standing to bring the Article 78 proceeding. (January Order at 5.)

Specifically, Justice Clemente held that there was no

> evidence which would indicate that the credit card companies acted on the basis of [the February Letters], particularly as [the February Letters] were written several months prior to the date upon which petitioner was allegedly contacted by the credit card companies. In fact, the purported injury suffered by petitioner is not attributable to any government function or activity, but rather appears to be the result of the credit card companies' 'longstanding policies that prohibit the use of their credit cards for illegal transactions.'

Smith v. Spitzer, No. 2494-05, slip op. at 4-5 (Sup. Ct. June 22, 2005) (citation omitted). The Appellate Division, in affirming the lower court's dismissal, further stated that "it cannot be said that petitioner

suffered an injury attributable to respondent's actions." Smith v. Spitzer, 28 A.D.3d 1047, 1048, 814 N.Y.S.2d 338 (App. Div. 2006).

Plaintiff now comes before this Court, bringing an action against the same Defendant that he sued in state court, making identical allegations. To be fair, Plaintiff alleges additional and subsequent facts in the Second Amended Complaint, which the Court will address in turn. The allegations made in the Article 78 proceedings concerning the February Letters, however, are the same factual allegations that are made in Counts I and II of the Second Amended Complaint, although Plaintiff now alleges that additional rights were violated by these same actions. In addition, Plaintiff requests the same type of relief that he sought in his Article 78 proceeding – injunctive and declaratory relief. In light of the foregoing, Defendant also urges this Court to accord the Article 78 proceeding res judicata effect.

Pursuant to 28 U.S.C. § 1738, federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City Sch. Dist. Bd. Of Educ., 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). This rule holds true "even if there is jurisdiction to hear the merits of the claim, and the claim is otherwise properly presented." McKithen v. Brown, 481 F.3d 89, 103 (2d Cir. 2007). As such, the Court must look to New York law to determine whether res judicata applies.

The doctrine of res judicata, or claim preclusion, is based on the theory that "a valid final judgment bars future actions between the same parties on the same cause of action." Parker v. Blauvelt Volunteer Fire Co., Inc., 93 N.Y.2d 343, 347, 712 N.E.2d 647, 690 N.Y.S.2d 478 (1999). Essentially, "it prevents a plaintiff from raising a claim that was or could have been raised in a prior suit." McKithen, 481 F.3d at 104. New York courts employ a "transactional approach" to claim preclusion. Id. In other words, "if claims arise out of the same 'factual grouping' they are deemed to be part of the same cause of action and the later claims will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief." Davidson v. Capuano, 792 F.2d 275, 278 (2d Cir. 1986). Under New York law, claim preclusion bars a subsequent action if the Court finds that

> (1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.

Pike v. Freeman, 266 F.3d 78, 91 (2d Cir. 2001) (internal quotation marks and citation omitted).

Plaintiff contends that Defendant's res judicata argument must fail for two reasons: (1) Article 78 proceedings are limited, summary-type proceedings and (2) the Article 78 proceeding was dismissed on procedural grounds; there was no

adjudication on the merits. (Pl.'s Opp'n to Dismiss Am. Compl. 9.) Plaintiff's first argument need not detain the Court very long. There is no per se rule against giving Article 78 proceedings preclusive effect provided that the relief sought in the subsequent proceeding was available to the plaintiff in the prior action. See Collard v. Inc. Village of Flower Hill, 759 F.2d 205, 206-07 (2d Cir. 1985) (affirming dismissal of subsequent federal action on grounds of res judicata following an unsuccessful Article 78 proceeding); Fulani v. MacKay, No. 06-CV-3747, 2007 U.S. Dist. LEXIS 22415, at *19 (giving preclusive effect to a prior Article 78 proceedings that declined to declare a New York statute unconstitutional) (S.D.N.Y. 16 March 29, 2007); Bess v. Spitzer, 459 F. Supp. 2d 191, 199 (E.D.N.Y. 2006) (affording prior Article 78 proceeding preclusive effect where plaintiff sought injunction barring continued criminal prosecution). Here, Plaintiff requests the same type of relief that he sought in his Article 78 proceeding – injunctive and declaratory relief. Consequently, provided that the elements of res judicata are satisfied, an Article 78 proceeding may preclude a subsequent action.

Plaintiff's second argument, however, poses a more difficult question for the Court. Generally, "dismissal for lack of subject matter jurisdiction is not an adjudication of the merits, and hence has no res judicata effect." St. Pierre v. Dyer, 208 F.3d 394, 400 (2d Cir. 2000) (holding no preclusion where the prior action was dismissed for lack of Article III standing). As Defendant has brought to the Court's attention, however, when an action is dismissed for lack of standing and the litigant has failed to cure

his lack of standing, New York courts afford the prior decision res judicata effect. See Landau, P.C. v. LaRossa, Mitchell & Ross, 41 A.D.3d 371, 372, 838 N.Y.S.2d 773 (App. Div. 2007); see also Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890, 898 n.10 ("We note only that the issue of [plaintiffs'] standing, by all accounts, has been determined adversely to them in the state courts and that decision is binding upon us under principles of res judicata."); Tycon Tower I Inv. Ltd. P'ship v. John Burgee Architects, No. 95-CV-6951, 1999 U.S. Dist. LEXIS 17 13305, at *26 (S.D.N.Y. Aug. 30, 1999) ("There is ample support for the legal conclusion that a prior decision on lack of standing has a res judicata effect as to that litigant."); Pullman Group, LLC v. Prudential Ins. Co. of Am., 297 A.D.2d 578, 747 N.Y.S.2d 170 (App. Div. 2002) ("Since a dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes, plaintiff is not precluded from reasserting the same claims based on newly conferred rights which cure the prior lack of capacity.") (emphasis added); Burns v. Egan, 117 A.D.2d 38, 42, 501 N.Y.S.2d 742 (App. Div. 1986) ("Res judicata effect may be given to the narrow ground on which the earlier adjudication was premised.").

Although this Court may not necessarily agree with the rationale of the state court, it is bound to give the same preclusive effect to its decision as New York State courts would afford such decision. See Migra, 465 U.S. at 81. Because Plaintiff's factual allegations regarding the cause of his injuries in Counts I and II are identical to the allegations made in his Article 78 proceeding – namely, that several

months after receiving the February Letters, Cardservice International and Discover Network terminated their relationships with Plaintiff, Plaintiff has failed to cure his standing deficiency. (2d Am. Compl. ¶¶ 10-11, 15-16; Smith, No. 2494-05, slip op. at 4.) Accordingly, this Court is bound by the state court's decision, and Plaintiff is precluded from bringing claims that were or could have been raised in the Article 78 proceeding. See McKithen, 481 F.3d at 104.

Additionally, the state court went on to find that the Fort Albany Treaty did not bestow upon Plaintiff any rights as an individual tribal member and also stated that, "upon review," Plaintiff's remaining arguments were without merit.[7] Spitzer, 28 A.D.3d at 1048-49. Such a determination, although couched in terms of "standing," does not refer to Article III standing, but rather Plaintiff's

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[7] Plaintiff submitted supplemental authority from the Ninth Circuit to support his contention that individual tribal members can enforce rights conferred to Indian tribes in treaties. See United States v. Smiskin, 487 F.3d 1260, 1272 (9th Cir. 2007). Besides the fact that Smiskin is not binding on this Court and that it involves a different treaty and different tribes than this case, the Smiskin court did not analyze whether the treaty at issue conferred rights on the individual tribal members or only the tribe. In fact, the Yakima Nation was an intervenor in the action. Id. Moreover, the Smiskin court relied heavily on a prior Ninth Circuit case interpreting the same treaty, in which the tribe was an intervening party. See Cree v. Flores, 157 F.3d 762, 764 (9th Cir. 1998). Moreover, in Smiskin, there was no prior action raising res judicata issues and no Article III standing issue. Although Plaintiff offers Smiskin as supplemental authority, Smiskin does not share many of the issues raised by the underlying action. Thus, the Court is unpersuaded that it should follow the holding in Smiskin rather than binding precedent.

standing under the Fort Albany Treaty - a determination on the merits. See Motorola Corp. v. Uzan, 388 F.3d 39, 55 (2d Cir. 2004) (explaining that a dismissal for lack of statutory standing under RICO is one on the merits rather than for lack of subject matter jurisdiction); Lerner v. Fleet Bank, N.A., 318 F.3d 113, 129-30 (2d Cir. 2003) (holding that lack of statutory standing "is not jurisdictional in nature . . . but is rather an element of the merits addressed under a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim"); see also Bess v. Spitzer, 459 F. Supp. 2d 191, 200 (E.D.N.Y. 2006) (giving res judicata effect to a prior state-court decision where the state court discussed the merits of the case after finding no standing) (citing Williams v. Ward, 556 F.2d 1143, 1154 (2d Cir. 1977) (holding that alternative procedural and substantive grounds for dismissal did not "rob the substantive grounds of res judicata effect as to any identical claim")). As such, even if the Court were not bound by the state court's Article III standing determination, the state-court decision also addressed the merits of Plaintiff's claim.

Since it is undisputed that the previous action involved the same parties as the underlying action, the Court now analyzes whether the claims set forth in the Second Amended Complaint were or could have been raised in the state court action.

> Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and

> whether the facts essential to the second were present in the first.

Monahan v. New York City Dep't of Corr., 214 F.3d 275, 289 (internal quotation marks and citation omitted); see also O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687 (1981) ("once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"). To determine whether two actions arise from the same transaction or series of transactions, the Court "look[s] to whether the underlying facts are related in time, space, origin, or motivations, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Pike, 266 F.3d at 91 (internal quotation marks omitted).

Defendant argues that Counts I, II, and III arise out of the same transaction or series of transactions and are based upon the same legal theories that were raised or could have been raised in Plaintiff's Article 78 proceeding. Plaintiff does not make any arguments with respect to whether the claims brought here were or could have been raised in the Article 78 proceeding; he simply contends that there was no adjudication on the merits.

The letters underpinning Counts I and II, which were the subject of the prior action, were sent within several months of the June letter, on which Count III is premised. Moreover, based on the

allegations, the content of the June Letter was substantially similar to the February Letters and was sent by Defendant for the same reason. Accordingly, Count III involves the "same course of conduct" as Counts I and II and, therefore, clearly arises from the same series of transactions. NLRB v. United Tech. Corp., 706 F.2d 1254, 1260 (quoting Lawlor, 349 U.S. at 327-28).

In the Article 78 proceeding, Plaintiff claimed that PHL § 1399-ii was invalid based on his guaranteed right to free trade pursuant to the Fort Albany Treaty. A theory he raises in Counts I-III of this action. Here, however, he also raises other legal theories – namely, that application of PHL § 1399-ii as against him and the transactions in which he enters is also barred by the Contract Clause, pre-emption of New York State's jurisdiction under the Indian Commerce Clause and various federal statutes, policy of the United States concerning Indians, and the trustee relationship between the United States and Plaintiff – all of which Defendant urges could have been raised in the prior action. Plaintiff offers no argument disputing the assertion that these theories could have been raised in his Article 78 proceeding. Clearly, constitutional challenges to state statutes may be brought in state court proceedings. See Bess, 459 F. Supp. 2d at 195 (involving a challenge to New York tax laws as unconstitutional brought in an Article 78 proceeding). All of the statutes, rights, and principles that Plaintiff now claims that Defendant violated, would have been violated at the time he brought the Article 78 proceeding. Additionally, as previously noted, Plaintiff sought the same relief in

both actions and, therefore, this case does not involve a situation in which the relief now sought was not available to Plaintiff at the time of the prior proceeding. See, e.g., Marvel Characters v. Simon, 310 F.3d 280, 287 (2d Cir. 2002).

Having determined that all the elements of claim preclusion under New York law are satisfied, the Court finds Plaintiff's claims, as set forth in Counts I, II, and III of the Second Amended Complaint, are precluded by the doctrine of res judicata. Accordingly, Defendant's motion to dismiss is GRANTED with respect to Counts I, II, and III.

ii. Redressability

Furthermore, the Court still finds Plaintiff's allegations concerning redressability wanting. The Second Amended Complaint now seeks relief so that Plaintiff and each of the Merchants "may repair and restore their business relationships." (2d Am. Compl. ¶ 35.) Namely, Plaintiff asks the Court to enjoin enforcement of PHL § 1399-ii as to transactions between Plaintiff and the Merchants and to require Defendants to send written notices to the Merchants withdrawing the Initial Letters and refrain from future letters similar to the Initial Letters. (Id.) Unlike the First Amended Complaint, where the Court was left to make assumptions and draw inferences, Plaintiff at least has alleged that the relief requested will allow Plaintiff and the Merchants to work on repairing and restoring their relationships. Plaintiff still fails, however, to allege that the Merchants will or are likely to restore their relationships with Plaintiff. See Bennett, 520 U.S. at

167. As alleged, the restoration of such relationships remains speculative. Consequently, Plaintiff also lacks constitutional standing to bring Counts I, II, and III.

b. Gutlove Letter – Counts IV And V

i. Injury In Fact

Pursuant to the January Order, Plaintiff's fourth count was dismissed for failure to allege an actual or imminent injury. (January Order at 11.) As previously noted, a plaintiff's injury must be "imminent, not conjectural or hypothetical." Bennett, 520 U.S. at 167. The Second Amended Complaint remedies this deficiency. Plaintiff alleges that the Gutlove Letter caused Gutlove, under duress, to reduce the shipment of PhillipMorris products to Plaintiff by 90% within approximately two months of the date of the letter. (2d Am. Compl. ¶ 28.) Subsequently, shipment was reduced by an additional 35%. (Id.) For the reasons discussed in Section II.A.1 of the January Order, the Court finds such statements sufficient to allege an injury in fact - loss of business.

ii. Causal Connection

The Court questions, however, whether Plaintiff has sufficiently alleged a causal connection between the loss of business and the Gutlove Letter. Plaintiff alleges that, in the Gutlove Letter, Defendant wrongfully pressured and threatened Gutlove to "terminate its business relationship with

Plaintiff by threatening liability under New York State law of the vendor continued to conduct business with Plaintiff." (2d Am. Compl. ¶ 27.) Satisfaction of the causation requirement is belied by the fact that Gutlove continues to do business with Plaintiff, albeit at a reduced level. (Id. ¶ 28.)

iii. Redressability

Furthermore, with respect to redressability, Plaintiff makes the same requests for relief with respect to Counts IV and V as he makes with respect to Counts I-III.[8] (Id. ¶¶ 36-37.) For the reasons discussed in Section I.B.1.a.ii, supra, Plaintiff failed to sufficiently allege that it would be likely that Gutlove and PhillipMorris would restore their relationships with Plaintiff if afforded the relief requested.

Accordingly, Plaintiff lacks standing to assert the claims in Counts IV and V.

iv. Res Judicata As To Counts IV And V

Defendant also contends that Counts IV and V are barred by res judicata because they are premised on a claim that arises from the same factual grouping as the prior action, and Plaintiff could have raised the legal theories brought here in the prior litigation but failed to do so. The Gutlove Letter is dated June 28, 2006 and speaks to Plaintiff's

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[8] Count V, although new to the Second Amended Complaint, is based on the same facts as alleged with respect to Count IV – the Gutlove Letter.

violation of N.Y. Tax Law § 471- e, which, the letter states, went into effect on March 1, 2006. The Article 78 proceeding, which involved the application of PHL § 1399-ii as against Plaintiff, was commenced in April 2005. Moreover, the Supreme Court, Albany County, dismissed the action on June 22, 2005, and the Appellate Division affirmed on April 27, 2006. Although Defendant's motive in sending the Gutlove Letter may have been the same as that for sending the Initial Letters, it involves a law that was not even scheduled to become effective until one month prior to the Appellate Division's affirmance and a letter, the Gutlove Letter, that was not sent until approximately two months after the final decision. Under these circumstances, the Court finds that Plaintiff could not have brought claims concerning the Gutlove Letter in his Article 78 proceeding. Accordingly, such claims are not barred by res judicata.

2. TIA[9]

The Court also lacks jurisdiction over Counts IV and V based on the TIA. The TIA bars federal district courts from enjoining or restraining the collection of state taxes "where a plain, speedy, and efficient remedy may be had" in state court. 28 U.S.C. § 1341. The purpose of the TIA is to "limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." California v. Grace Brethren Church, 457 U.S. 393, 408-09, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982). Defendant argues that the TIA bars this Court from exercising subject matter jurisdiction with respect to Counts IV and V, pursuant to which Plaintiff seeks this Court to enjoin application of N.Y. Tax Law § 471-e as against Plaintiff and declare the law "not in effect." Plaintiff opposes this argument based on three reasons: (1) Plaintiff does not seek to enjoin, suspend, or restrain the assessment or collection of a New York State tax; (2) a plain, speedy, and efficient remedy is not available in state court; and (3) the federal instrumentality doctrine.

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[9] Defendant argues that both the TIA and the doctrine of comity, existing before enactment of the TIA in 1937, bar this Court from exercising jurisdiction. For purposes of this analysis, the principles associated with both the TIA and doctrine of comity appear to be similar. See Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 n.8, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981) ("We discern no significant difference, for purposes of the principles recognized in this case, between remedies which are 'plain, adequate, and complete' as that phrase has been used in articulating the doctrine of equitable restraint, and those which are 'plain, speedy and efficient,' within the meaning of [the TIA]."). Accordingly, the Court refers only to the TIA in its analysis.

a. Relief Requested

Plaintiff simply asserts that nowhere in the Second Amended Complaint does he request the Court to issue an injunction to restrain collection of taxes. (Pl.'s Opp'n to Dismiss 2d Am. Compl. 9.) Without any support or further explanation, the Court cannot agree. N.Y. Tax Law § 471-e requires that cigarettes purchased on an Indian reservation from persons who are not members of the tribe be taxed. Plaintiff clearly requests this Court (1) to issue a declaratory judgment that N.Y. Tax Law § 471-e is "invalid, as applied to Plaintiff and to transactions between Plaintiff and [Gutlove] and PhillipMorrisUSA," (2d Am. Compl. ¶ 36.) (2) to enjoin "the enforcement of any provision of NY Tax Law § 471-e as to transactions between Plaintiff and [Gutlove] and PhillipMorrisUSA," (Id. ¶ 37.A.) and (3) to declare that N.Y. Tax Law § 471-e "is not in effect." (Id. ¶ 38.) If Plaintiff were to obtain the relief sought, New York State would be prohibited from collecting taxes on cigarettes that Plaintiff sells to non-Indians and individuals who are not members of the Shinnecock Indian Nation. Thus, the Court is not persuaded by Plaintiff's first conclusory argument.

b. Plain, Speedy, And Efficient Remedy

"Two conditions must exist before the TIA can be invoked[:]" (1) taxes and (2) the state remedies available to Plaintiff must be "plain, speedy and efficient." Hattem v. Schwarzenegger, 449 F.3d 423, 427 (2d Cir. 2006). Plaintiff contends that because

Plaintiff's Article 78 proceeding was dismissed on procedural grounds, he does not have a plain, speedy and efficient remedy available to him in state court.

Defendant argues that simply because Plaintiff is unhappy with the outcome of his state-court action does not mean that such action was not an adequate remedy for purposes of the TIA. As such, Defendant asserts that the Article 78 proceeding afforded Plaintiff a plain, speedy and efficient remedy, regardless of the outcome. Furthermore, Defendant argues that Plaintiff was denied relief based on a substantive ground – no standing under the Fort Albany Treaty – not purely procedural grounds.

As an initial matter, the Court notes that according to the Appellate Division's decision, Plaintiff's Article 78 proceeding challenged the application of PHL § 1399-ii as to Plaintiff; it did not involve enforcement of N.Y. Tax Law § 471-e. Smith v. Spitzer, 28 A.D.3d 1047 (App. Div. 2006). The fact that Plaintiff's Article 78 proceeding challenging PHL § 1399-ii was dismissed based on lack of standing should have no impact on Plaintiff's ability to challenge enforcement of N.Y. Tax Law § 471- e in a plain, speedy and efficient proceeding.

In addition, Defendant cites Day Wholesale, Inc. v. State of New York, as further evidence that Plaintiff has an adequate remedy in state court. No. 2006-7668, slip op. (Sup. Ct. Erie County Jan. 2, 2007.) In Day Wholesale, the plaintiffs sought a temporary restraining order and preliminary injunction, by way of an order to show cause,

restraining defendants from enforcing provisions of N.Y. Tax Law § 471-e. (Id. at 1.) The court granted the preliminary injunction, finding that N.Y. Tax Law § 471-e

> is not in effect because on March 1, 2006 and subsequent thereto there has not been any actions taken or rules and regulations issued that would be necessary to implement the provisions of this act. Moreover, even if the statute was deemed to be in effect, the statute cannot function as written, the most notable reason being that Indian tax exemption coupons do not exist.

Id. at 5. Plaintiff disputes Defendant's reliance on Day Wholesale, claiming that Day Wholesale only involved an attack on the validity of the statute on its face, while this action involves an assertion of Indian rights. The Court fails to see the distinction in this case.

Plaintiff contends that N.Y. Tax Law § 471-e is not in effect based on the same reasons asserted by plaintiffs in Day Wholesale – the rules, regulations and Indian tax exemption coupons were never issued. (2d Am. Compl. ¶ 32.) Based on this conclusion, Plaintiff takes issue with the Gutlove Letter and Defendant's threat to enforce N.Y. Tax Law § 471-e and contends that Defendant violated numerous Constitutional provisions. (Id. ¶¶ 29, 33.) While Plaintiff may claim violation of different rights than the plaintiffs in Day Wholesale, he seeks the same remedy based on the same reasons.

Plaintiff cites only to his state case to support his argument that he has no plain, speedy and efficient state remedy. Defendant, on the other hand, cites to cases that establish that a plaintiff may challenge the constitutionality of a New York State tax statute by seeking a declaratory judgment without having to exhaust administrative remedies. See Empire State Bldg. Co. v. New York State Dep't of Taxation and Fin., 185 A.D.2d 201, 201-02, 586 N.Y.S.2d 591 (App. Div. 1992); Two Twenty E. Ltd. P'ship v. New York State Dep't of Taxation and Fin., 185 A.D.2d 202, 586 N.Y.S.2d 596 (App. Div. 1992). In addition, the Supreme Court has recognized the availability of a declaratory judgement in New York State courts as a plain, speedy and efficient remedy under the TIA. Tully v. Griffin, Inc., 429 U.S. 68, 75-76, 97 S. Ct. 219, 50 L. Ed. 2d 227 (1976).

Accordingly, the Court finds that Plaintiff has a "plain, speedy and efficient" remedy in the New York State courts to challenge application and enforcement of N.Y. Tax Law § 471-e.

c. Federal Instrumentality Doctrine

"There is a well-recognized exception to the Tax Injunction Act of 1937 where the United States sues to protect itself or its instrumentalities from state taxation." United States v. County of Nassau, 79 F. Supp. 2d 190, 192 (E.D.N.Y. 2000). This exception is commonly referred to as the federal instrumentality doctrine. The core issue in analyzing applicability of this doctrine is whether "the particular institution threatened with taxation is so

closely related to governmental activity as to become tax immune." Id. (citations omitted).

Plaintiff contends that because the United States could have brought this action on behalf of Plaintiff as trustee, the federal instrumentality doctrine applies. The cases cited by Plaintiff were all brought by the United States itself or by an Indian tribe, in which it was "reasonably clear" that the United States could have brought the action itself. See Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) (finding it "reasonably clear" that the United States could have brought the action by itself or as a co-plaintiff); Heckman v. United States, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820 (1912); United States v. Rickert, 188 U.S. 432, 23 S. Ct. 478, 47 L. Ed. 532 (1903). Again, Plaintiff offers no support for his conclusory statement that the United States could have brought this action on behalf of Plaintiff. Plaintiff is an individual, not an Indian tribe, and he is not suing on behalf of an Indian tribe. The facts do not support a finding that Plaintiff's activity "is so closely related to governmental activity as to become tax immune." County of Nassau, 79 F. Supp. 2d at 192. Consequently, the Court finds the federal instrumentality doctrine inapplicable. The TIA, therefore, is an additional bar to this Court's jurisdiction over Counts IV and V.

In sum, the Court lacks jurisdiction over Plaintiff's action and, therefore, Defendant's motion to dismiss is GRANTED.

II. Leave To Amend

Plaintiff seeks a fourth attempt to plead his case. Plaintiff requests leave to file a Third Amended Complaint solely to add a sixth cause of action asserting a new legal theory based on a United Nations' human rights treaty ratified by the United States in 1994, entitled the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination. See International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the U.N. General Assembly Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by the United States June 24, 1994) ("CERD"). The premise of proposed Count VI is that Defendant, in failing to recognize and honor Plaintiff's treaty and other Indian rights, has engaged in racial discrimination based on Plaintiff's status as an aborigine Shinnecock Indian in violation of CERD. (Prop. 3d Am. Compl. ¶35.) Plaintiff seeks the identical relief he sought in the Second Amended Complaint and, except as noted, the Third Amended Complaint is identical to the Second Amended Complaint, over which the Court found it lacked jurisdiction.

A. Legal Standard

Rule 15(a) provides that, where, as here, a responsive pleading has been served, a party may amend only by leave of Court. Fed. R. Civ. P. 15(a). In general, leave to amend should be freely granted, unless there is undue delay, bad faith, futility, or prejudice to the non-moving party, and the decision to grant or deny a motion to amend rests within the

sound discretion of the district court. See Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc., 404 F.3d 566, 603-04 (2d Cir. 2005); Zahra v. Town of Southold, 48 F.3d 674, 685 (2d Cir. 1995). Defendant opposes Plaintiff's motion for leave to amend based on grounds of futility, undue delay, and prejudice to Defendant.

B. Futility

"A proposed amendment is futile when it fails to state a claim upon which relief can be granted." Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990). A determination of futility is governed by the same standards as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). Under Rule 12(b)(6), the Court must accept as true all the factual allegations in the Complaint and draw all reasonable inferences in favor of Plaintiff. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); see also Bolt Elec. Inc. v. City of New York, 53 F.3d 465, 469 (2d. Cir. 1995). As noted above, a court may dismiss an action, pursuant to Rule 12(b)(6), if the plaintiff failed to plead "enough facts to state a claim to relief that is plausible on its face." See Bell Atlantic Corp., 127 S. Ct. at 1974; see also Iqbal, 490 F.3d at 157-58. "Factual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp., 127 S. Ct. at 1965. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999)

(quoting Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995)).

To the extent Plaintiff seeks to bring Count VI based on Defendant sending the Initial Letters, any amendment would be futile. As previously determined, Plaintiff is precluded from bringing any claims that were or could have been brought in the prior action. To the extent Plaintiff contends that Defendant violated his rights under CERD by sending the Initial Letters, Plaintiff is seeking identical relief based on the same set of facts under a new legal theory. See O'Brien, 54 N.Y.2d at 357 ("once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy") (emphasis added). The theory espoused in Count VI, however, was available to be raised at the time Plaintiff brought his Article 78 proceeding. The United States ratified CERD in 1994. That Plaintiff may not have learned of CERD until after the state-court action or not realized that it was an argument he could make is of no moment. The fact remains that CERD existed and could have been raised by Plaintiff in the prior action. Accordingly, Count VI, to the extent premised on the Initial Letters and actions underlying the Article 78 proceeding, is barred by res judicata.

To the extent Plaintiff alleges that his rights under CERD were violated as a result of Defendant sending the Gutlove Letter and other actions not connected to the prior action, res judicata does not preclude such a claim. Nonetheless, the Court finds

amendment would be futile because it would lack jurisdiction over such claim. The relief requested in the proposed Third Amended Complaint is identical to the relief requested in the Second Amended Complaint. Having already determined that Plaintiff's proposed CERD claim would be precluded with respect to the facts and claims underlying Counts I-III, the Court turns to the relief requested in connection with Counts IV and V.

As set forth above, Plaintiff asks this Court to declare invalid, and enjoin enforcement of, N.Y. Tax Law § 491-e as against Plaintiff and his transactions with Gutlove and PhillipMorris and to declare such law not in effect. Plaintiff seeks the identical relief as a remedy to his proposed CERD claim. (Prop. 3d Am. Compl. ¶¶ 43, 44.) The Court previously determined, however, that it lacks jurisdiction to grant such relief under the TIA. Having already concluded that Plaintiff has a speedy, fair and efficient remedy in state court, although he may not like the outcome, and that the federal instrumentality doctrine does not apply, the Court would lack jurisdiction over the CERD claim to the extent Plaintiff seeks the Court to invalidate and enjoin enforcement of N.Y. Tax Law § 491-e.

Moreover, the Court finds amendment would be futile because the CERD does not provide a private right of action. Plaintiff argues that Article 6 of the CERD is clearly self-executing and, therefore, he does have a private right of action under the CERD.

> Self-executing treaties are those that immediately create rights and duties of private individuals which are enforceable and [are] to be enforced by domestic tribunals. Non-self-executing treaties require implementing action by the political branches of government or . . . are otherwise unsuitable for judicial application.

Flores v. S. Peru Copper Corp., 343 F.3d 140, 163 (2d Cir. 2003) (internal quotation marks and citations omitted). Article 6 of the CERD provides:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparations . . . .

CERD, Art. 6. This section states that the member countries "shall assure" that their citizens are afforded protection under the CERD. It does not, by itself, "immediately create rights and duties of private individuals." Flores, 414 F.3d at 233. Furthermore, as recognized by other courts in this Circuit, the United States, when ratifying the CERD, expressly declared that "the provisions of the Convention are not self-executing." Hayden v. Pataki, No. 00-CV- 8586, 2004 U.S. Dist. LEXIS 10863, at *23 (S.D.N.Y. June 14, 2004) (quoting United States v. Perez, 2004 U.S. Dist. LEXIS 7500,

at *52 (D. Conn. April 29, 2004) (citing U.S. Senate Resolution of Advice and Consent to Ratification of the CERD, 140 Cong. Rec. S7634-02 (June 24, 1994); U.S. Senate Resolution of Advice and Consent to Ratification of the ICCPR, 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 2, 1992) (declaring that "the provisions of articles 1 through 27 of the Covenant are not self-executing."))); see also Rotar v. Placer County Superior Court, No. 07-CV-0044, 2007 U.S. Dist. LEXIS 28212, at *2-3 (E.D. Cal. April 16, 2007) (concurring with Hayden and Perez); Johnson v. Quander, 370 F. Supp. 2d 79, 101 (D.D.C. 2005) (same). Based on the foregoing, the Court finds that the CERD does not provide a private cause of action.

Because the Court agrees that any amendment to include a CERD claim would be futile, it does not address Defendant's other arguments. Plaintiff's motion for leave to file a Third Amended Complaint is DENIED.

III. Remaining Requests

In light of the foregoing, Plaintiff's motion for a preliminary injunction, to consolidate this case with Smith v. Everson, No. 06-CV-791, and for a pre-motion conference are rendered moot. The Court, however, notes its full agreement with the decision rendered by United States District Court Sandra J. Feuerstein on August 6, 2007 denying Plaintiff's motion to consolidate the underlying action with Smith v. Everson.

CONCLUSION

For the reasons stated herein, the Defendant's motion to dismiss the Second Amended Complaint is GRANTED. Plaintiff's motions (1) for a preliminary injunction, (2) for leave to amend, (3) to consolidate, and (4) for a pre-motion conference are DENIED. The Clerk of the Court is directed to mark this matter CLOSED.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: September 30, 2007
Central Islip, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JONATHAN K. SMITH, a member of the Shinnecock Indian Nation, a/k/a SHINNECOCK SMOKE SHOP, residing and with his place of business on the Shinnecock Indian Nation Reservation,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York,

Defendant.

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SECOND AMENDED COMPLAINT

Case No.: CV-06-3181(JS)(WDW)

Hon.: Joanna Seybert

NOW COMES JONATHAN K. SMITH, a/k/a SHINNECOCK SMOKE SHOP, PLAINTIFF, by and through counsel, MOORE INTERNATIONAL LAW OFFICES, P.C., and complains against ELIOT SPITZER, DEFENDANT, and states as follows:

JURISDICTION & VENUE

1. PLAINTIFF, JONATHAN K. SMITH, is a member of the Shinnecock Indian Nation, doing business as SHINNECOCK SMOKE SHOP, under license by the Shinnecock Indian Nation, with his

residence and place of business located at Old Pointe Road on the Shinnecock Indian Reservation, located within the territorial boundaries of the Town of Southampton, County of Suffolk, State of New York, 11968;

2. DEFENDANT, ELIOT SPITZER, is an individual in his official capacity as the Attorney General of the State of New York, with his principal office in the County of Albany, at The Office of the New York State Attorney General, The Capital, Albany, New York, 12224;

3. This court has federal question jurisdiction pursuant to 28 U.S.C. § 1331;

4. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b)(2);

RELATED CASES

5. PLAINTIFF incorporates by reference paragraphs previously plead herein;

6. There are no other pending actions between the parties arising out of the same transaction or occurrence;

7. Previous application for the relief herein prayed for has been made in the following action arising out of the same transaction or occurrence:

A. *Smith v. Spitzer*, Supreme Court of the State of New York, Albany County,

Index No. 2494-05 (dismissed on procedural grounds), *aff'd*, Appellate Division, Third Judicial Department, No. 99054;

CAUSE OF ACTION

COUNT I

8. PLAINTIFF incorporates by reference paragraphs previously plead herein;

9. On or about the 19th of March, 2006, *The Buffalo News*, Buffalo, New York, quoted the DEFENDANT as stating and describing Indian Nation retailers shipping cigarettes over the internet as a "massive criminal enterprise";

10. On or about February 2005, PLAINTIFF was contacted by Discover Network, about a letter originating from the office of DEFENDANT, alleging that PLAINTIFF was operating his business in violation of New York State Public Health Law 1399-11, which PLAINTIFF denied then, and PLAINTIFF denies now;

11. DEFENDANT did wrongfully pressure and threaten Discover Network to terminate its business relationship with PLAINTIFF by threatening the vendor with liability under New York State law if the vendor continued to conduct business with PLAINTIFF, and DEFENDANT did otherwise wrongfully interfere with the contractual relationship between PLAINTIFF and Discover Network;

12. DEFENDANT'S false allegations, and wrongful interference, pressure, and threats caused Discover Network, under duress, to terminate its merchant agreement with PLAINTIFF, unless and until DEFENDANT withdrew his letter;

13. DEFENDANT'S false allegations, and wrongful interference, pressure, and threats of enforcement of PHL 1399- ll, are in,

A. Violation of the treaty guarantee of free trade under the terms of Article 4 and Appended Article 3 of *The Fort Albany Treaty, 1664,* ("Articles between Col. Cartwright and the New York Indians", *Documents Relative to the Colonial History of the State of New York,* III, pp. 67-68);

B. Violation of the Contract Clause of the federal constitution, U.S. CONST. Art. I, § 10 cl. 1;

C. Without and in excess of jurisdiction, as federal jurisdiction is exclusive and New York State jurisdiction is preempted, pursuant to the Indian Commerce Clause of the federal constitution, U.S. CONST. art. I, § 8, cl. 3, and 18 U.S.C. §§ 1151 *et seq,* specifically 18 U.S.C. § 1162, and 28 U.S.C. § 1360;

D. Violation of the policy of the Congress of the United States concerning Indians;

E. Violation of and unduly interferes in the trustee relationship of the government of the United States of America as trustee and guardian of PLAINTIFF;

COUNT II

14. PLAINTIFF incorporates by reference paragraphs previously plead herein;

15. On or about February 2005, PLAINTIFF was contacted by Cardservice International, about a letter originating from the office of DEFENDANT, alleging that PLAINTIFF was operating his business in violation of New York State Public Health Law 1399-11, which PLAINTIFF denied then, and PLAINTIFF denies now;

16. DEFENDANT did wrongfully pressure and threaten Cardservice International to terminate its business relationship with PLAINTIFF by threatening the vendor with liability under New York State law if the vendor continued to conduct business with PLAINTIFF, and DEFENDANT did otherwise wrongfully interfere with the contractual relationship between PLAINTIFF and Cardservice International;

17. DEFENDANT'S false allegations, and wrongful interference, pressure, and threats caused Cardservice International, under duress, to terminate its merchant agreement with PLAINTIFF, unless and until DEFENDANT withdrew his letter;

18. DEFENDANT'S false allegations, and wrongful interference, pressure, and threats of enforcement of PHL 1399-ll, are in,

A. Violation of the treaty guarantee of free trade under the terms of Article 4 and Appended Article 3 of *The Fort Albany Treaty, 1664,* ("Articles between Col. Cartwright and the New York Indians", *Documents Relative to the Colonial History of the State of New York,* III, pp. 67-68);

B. Violation of the Contract Clause of the federal constitution, U.S. CONST. Art. I, § 10 cl. 1;

C. Without and in excess of jurisdiction, as federal jurisdiction is exclusive and New York State jurisdiction is preempted, pursuant to the Indian Commerce Clause of the federal constitution, U.S. CONST. art. I, § 8, cl. 3, and 18 U.S.C. §§ 1151 *et seq,* specifically 18 U.S.C. § 1162, and 28 U.S.C. § 1360;

D. Violation of the policy of the Congress of the United States concerning Indians;

E. Violation of and unduly interferes in the trustee relationship of the government of the United States of America as trustee and guardian of PLAINTIFF;

COUNT III

19. PLAINTIFF incorporates by reference paragraphs previously plead herein;

20. On or about June 2005, PLAINTIFF was contacted by United Parcel Service, about a letter originating from the office of DEFENDANT, alleging that PLAINTIFF was operating his business in violation of New York State Public Health Law 1399-11, which PLAINTIFF denied then, and PLAINTIFF denies now;

21. DEFENDANT did wrongfully pressure and threaten United Parcel Service to terminate its business relationship with PLAINTIFF by threatening the vendor with liability under New York State law if the vendor continued to conduct business with PLAINTIFF, and DEFENDANT did otherwise wrongfully interfere with the contractual relationship between PLAINTIFF and United Parcel Service;

22. DEFENDANT'S false allegations, and wrongful interference, pressure, and threats caused United Parcel Service, under duress, to terminate its merchant agreement with PLAINTIFF, unless and until DEFENDANT withdrew his letter;

23. DEFENDANT'S false allegations, and wrongful interference, pressure, and threats of enforcement of PHL 1399-ll, are in,

A. Violation of the treaty guarantee of free trade under the terms of Article 4 and

Appended Article 3 of *The Fort Albany Treaty, 1664,* ("Articles between Col. Cartwright and the New York Indians", *Documents Relative to the Colonial History of the State of New York*, III, pp. 67-68);

B. Violation of the Contract Clause of the federal constitution, U.S. CONST. Art. I, § 10 cl. 1;

C. Without and in excess of jurisdiction, as federal jurisdiction is exclusive and New York State jurisdiction is preempted, pursuant to the Indian Commerce Clause of the federal constitution, U.S. CONST. art. I, § 8, cl. 3, and 18 U.S.C. §§ 1151 *et seq,* specifically 18 U.S.C. § 1162, and 28 U.S.C. § 1360;

D. Violation of the policy of the Congress of the United States concerning Indians;

E. Violation of and unduly interferes in the trustee relationship of the government of the United States of America as trustee and guardian of PLAINTIFF;

COUNT IV

24. PLAINTIFF incorporates by reference paragraphs previously plead herein;

25. On or about July 12, 2006, PLAINTIFF was contacted by its vendor, Gutlove & Shirvint Inc.,

about a letter dated the 28th of June, 2006, originating from the office of DEFENDANT, which DEFENDANT initially sent to PhillipMorrisUSA, and in turn PhillipMorrisUSA sent to Gutlove & Shirvint Inc., alleging that the sale of unstamped cigarettes to Indian Reservations (i.e. PLAINTIFF) is in direct violation of a new state law which went into effect on the 1st of March, 2006, to Wit: New York Tax Law § 471-e, which PLAINTIFF denies, and DEFENDANT in his letter did further allege and characterize, directly and/or indirectly, PLAINTIFF as criminal, and his vendor, Gutlove & Chirvint Inc. and its supplier, PhillipMorrisUSA as aiding and abetting criminal activity, in violation of New York Tax Law § 1814 and New York Penal Law § 20.00;

26. DEFENDANT did communicate such threats with knowledge and/or with reckless disregard that the New York State Department and Finance has no intention to alter its long-standing policy of allowing untaxed cigarettes to be sold from licensed stamping agents to recognized Indian Nations and reservation-based retailers making sales from qualified Indian reservations (i.e. Shinnecock Indian Nation and Shinnecock Indian Reservation), and will not issue assessments, despite enactment of New York Tax Law § 471-e, until certain issues and deficiencies in law are fully addressed and considered;

27. In his letter, DEFENDANT did wrongfully pressure and threaten Gutlove & Shirvint Inc. to terminate its business relationship with PLAINTIFF by threatening liability under New

York State law if the vendor continued to conduct business with PLAINTIFF, and DEFENDANT did otherwise wrongfully interfere with the contractual relationship between PLAINTIFF and Gutlove & Shirvint Inc.;

28. Five weeks after the date of DEFENDANT'S letter, DEFENDANT'S false allegations, and wrongful interference, pressure, and threats caused Gutlove & Shirvint Inc., under duress, to drastically reduce shipment of PhillipMorrisUSA products to PLAINTIFF by ninety percent (90%) beginning the first week of August 2006 to the last week of August 2006, and by thirty-five percent (35%) from the first week of September 2006 to the present, from the pre-letter level;

29. DEFENDANT'S false allegations, and wrongful interference, pressure, and threats of enforcement of New York Tax Law § 471-e, New York Tax Law § 1814, and New York Penal Law § 20.00, against PhillipMorrisUSA, Gutlove & Shirvint Inc. and PLAINTIFF, are in,

A. Violation of the treaty guarantee of free trade under the terms of Article 4 and Appended Article 3 of *The Fort Albany Treaty, 1664,* ("Articles between Col. Cartwright and the New York Indians", *Documents Relative to the Colonial History of the State of New York*, III, pp. 67-68);

B. Violation of the Contract Clause of the federal constitution, U.S. CONST. Art. I, § 10 cl. 1;

C. Without and in excess of jurisdiction, as federal jurisdiction is exclusive and New York State jurisdiction is preempted, pursuant to the Indian Commerce Clause of the federal constitution, U.S. CONST. art. I, § 8, cl. 3, and 18 U.S.C. §§ 1151 *et seq,* specifically 18 U.S.C. § 1162, and 28 U.S.C. § 1360;

D. Violation of the policy of the Congress of the United States concerning Indians;

E. Violation of and unduly interferes in the trustee relationship of the government of the United States of America as trustee and guardian of PLAINTIFF;

COUNT V

30. PLAINTIFF incorporates by reference paragraphs previously plead herein;

31. Specifically with regard to the actions of the DEFENDANT as alleged in Count IV, the letter of the DEFENDANT complained of was addressed and delivered to PhillipMorrisUSA at its address, 6601 West Broad Street, Richmond, Virginia, 23230;

32. New York Tax Law § 471-e, which purports to impose and regulate taxation of cigarette commerce on Indian reservations in New York State, is not in effect, and has never been in effect since the purported effective date of the 1st of March, 2006, for the reason that the statute on its face required

New York State to promulgate implementing rules and regulations, including Indian tax exemption coupons, by the purported effective date of the Act, and New York State failed to perform any required actions by or since the purported effective date;

33. DEFENDANT'S letter complained of in Count IV violated, and continues to violate, the Interstate Commerce Clause of the federal constitution, U.S. CONST. art. I, § 8, cl. 3, for the reason that DEFENDANT'S letter sent to the manufacturer PhillipMorrisUSA in Virginia, threatening to enforce New York Tax Law § 471-e, a New York State law never in effect, and a law which DEFENDANT knew or had reckless disregard for the fact that New York State would not enforce, resulted then, and continues to result now, in the drastic reduction of the shipment of PhillipMorrisUSA products to PLAINTIFF from Gutlove & Shirvint Inc.;

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, to vindicate his rights and to place PLAINTIFF and his vendors back in their pre-letter positions, so the PLAINTIFF and his vendors may repair and restore their business relationships, JONATHAN K. SMITH, PLAINTIFF, respectfully prays for the following relief:

Relief as to Counts I, II, and III.

34. A declaratory judgment that New York State Public Health Law 1399-11 is invalid, as applied to PLAINTIFF and to transactions between

PLAINTIFF and Cardservice International, Discover Network, and United Parcel Service;

35. To place PLAINTIFF, Cardservice International, Discover Network, and United Parcel Service, back to their position prior to DEFENDANT sending his letters, so that PLAINTIFF and said vendors may repair and restore their business relationships:

A. Injunctive relief enjoining the enforcement of any provision of New York State Public Health Law 1399-11 as to transactions between PLAINTIFF and Cardservice International, Discover Network, and United Parcel Service;

B. To this end, DEFENDANT shall send written notice to Cardservice International, Discover Network, and United Parcel Service that DEFENDANT withdraws his letters relating to PLAINTIFF, and DEFENDANT shall refrain from sending any further letters threatening enforcement of New York State Public Health Law 1399-11 as to transactions between PLAINTIFF and Cardservice International, Discover Network, and United Parcel Service;

C. Any temporary and/or preliminary injunctive relief shall be effective until such time as PLAINTIFF'S claims have been adjudicated on their respective merits or until further order of this Court;

Relief as to Count IV.

36. A declaratory judgment that New York Tax Law § 471-e is invalid, as applied to PLAINTIFF and to transactions between PLAINTIFF and Gutlove & Chirvint Inc. and PhillipMorrisUSA;

37. To place PLAINTIFF, Gutlove & Chirvint Inc. and PhillipMorrisUSA, back to their position prior to DEFENDANT sending his letter, so that PLAINTIFF and said vendors may repair and restore their business relationships:

A. Injunctive relief enjoining the enforcement of any provision of New York Tax Law § 471-e as to transactions between PLAINTIFF and Gutlove & Chirvint Inc. and PhillipMorrisUSA;

B. To this end, DEFENDANT shall send written notice to Gutlove & Chirvint Inc. and PhillipMorrisUSA that DEFENDANT withdraws his letter relating to PLAINTIFF, and DEFENDANT shall refrain from sending any further letters threatening enforcement of New York Tax Law § 471-e as to transactions between PLAINTIFF and Gutlove & Chirvint Inc. and PhillipMorrisUSA;

C. Any temporary and/or preliminary injunctive relief shall be effective until such time as PLAINTIFF'S claims have been adjudicated on their respective merits or until further order of this Court;

Relief as to Count V.

38. A declaratory judgment that New York Tax Law § 471-e is not in effect;

39. To place PLAINTIFF, Gutlove & Chirvint Inc. and PhillipMorrisUSA, back to their position prior to DEFENDANT sending his letter, so that PLAINTIFF and said vendors may repair and restore their business relationships:

A. Injunctive relief enjoining the enforcement of any provision of New York Tax Law § 471-e as to transactions between PLAINTIFF and Gutlove & Chirvint Inc. and PhillipMorrisUSA;

B. To this end, DEFENDANT shall send written notice to Gutlove & Chirvint Inc. and PhillipMorrisUSA that DEFENDANT withdraws his letter relating to PLAINTIFF, and DEFENDANT shall refrain from sending any further letters threatening enforcement of New York Tax Law § 471-e as to transactions between PLAINTIFF and Gutlove & Chirvint Inc. and PhillipMorrisUSA;

C. Any temporary and/or preliminary injunctive relief shall be effective until such time as PLAINTIFF'S claims have been adjudicated on their respective merits or until further order of this Court;

40. Any other and further relief to which PLAINTIFF may be entitled, including but not limited to, court costs, and reasonable attorney fees.

Dated this 24th day of January, 2007

Respectfully submitted,

/s/

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Counsel for JONATHAN K. SMITH, a/k/a
SHINNECOCK SMOKE SHOP, PLAINTIFF

A. The Fort Albany Treaty, 1664

Articles between Col. Cartwright and the New York Indians.

[New England, I. 207.]

Articles made and agreed upon the 24th day of September 1664 in Fort Albany between Ohgehando, Shanarage, Soachoenighta, Sachamackas of ye Maques; Anaweed Conkeeherat Tewasserany, Aschanoondah, Sachamakas of the Synicks, on the one part; and Colonell George Cartwright, in the behalf of Colonell Nicolls Governour under his Royall Highnesse the Duke of Yorke of all his territoryes in America, on the other part, as followeth, vizt—

1. Imprimis. It is agreed that the Indian Princes above named and their subjects, shall have all such wares and commodities from the English for the future, as heretofore they had from the Dutch.

2. That if any English Dutch or Indian (under the proteccon of the English) do any wrong injury or violence to any of ye said Princes or their subjects in any sort whatever, if they complaine to the Governor at NewYorke, or to the Officer in Cheife at Albany, if the person so offending can be discovered, that person shall receive condigne punishmt and all due satisfaccon shall be given; and the like shall be done for all other English Plantations.

3. That if any Indian belonging to any of the Sachims aforesaid do any wrong injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be made to y^e^ Sachims and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaccon shall be given to any of His Ma^ties^ subjects in any Colony or other English Plantacon in America.

4. The Indians at Wamping and Espachomy and all below the Manhatans, as also all those that have submitted themselves under the proteccon of his Ma^tie^ are included in these Articles of Agreement and Peace;

In confirmacon whereof the partyes above menconed have hereunto sett their hands the day and yeare above written

GEORGE CARTWRIGHT

In the presence of *Cawyugo*

T. Willett
John Manning [MARKS]
Tho. Breedon
Dan. Broadhead

{ Smith John
{ his marke

{Stephen an Indian
{ his marke

THESE ARTICLES following wer likewise proposed by the same Indian Princes & consented to by Colonell Cartwright in behalfe of Colonell Nicolls the 25th day of September 1664.

1 That the English do not assist the three Nations of the Ondiakes Pinnekooks and Pacamtekookes, who murdered one of the Princes of the Maques, when he brought ransomes & presents to them upon a treaty of peace.

2. That the English do make peace for the Indian Princes, with the Nations down the River.

3. That they may have free trade, as formerly.

4. That they may be lodged in houses, as formerly.

5. That if they be beaten by the three Nations above menconed, they may receive accommodacon from ye English.

B. Contract Clause – U.S. Const. Art. I, § 10, cl. 1

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make

anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

C. Indian Commerce Clause, Interstate Commerce Clause – U.S. Const. Art. I, § 8, cl. 3

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;